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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909. No. 736.

THOMAS FRANKLIN,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR UPON HIS MOTION FOR ADMISSION TO BAIL PENDING THE PROCEEDINGS IN ERROR.

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IN THE

Supreme Court of the United States,

No. , October Term, 1909.

Thomas Franklin,
Plaintiff-in-Error,
v.
The United States of America,
Defendant-in-Error.

Brief on behalf of Plaintiff-in-Error in support of his motion to be admitted to bail during the pendency of the Proceedings in Error in this Court.

Statement of the Case.

The title of the case in the Court below was The United States *v.* Thomas Franklin. The defendant was charged in several separate indictments in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, for violations of Sections 5391, 5438, and 5497 of the Revised Statutes of the United States, and for violations of Section 2, Chapter 576 of the Act of July 7th, 1898, 30 Stat. L. 717.

Defendant duly demurred to each and all of these indictments and to each and every count therein.

Subsequently the Government entered a *nolle prosequi* to all the counts alleging violations of Section 5391, Revised Statutes; the indictment laid under Section 5497, Revised Statutes, was dismissed on demurrer, to which judgment the Government prosecuted its writ of error to this Court where the cause is now pending; and the indictments under Section 5436, Revised Statutes, and Section 2, Chapter 576, Act of July 7, 1898, 30 St. L., 717, were, on motion of the Government, consolidated.

The indictment then, as consolidated, and on which defendant was convicted, purported to charge the defendant with:

1st. Presenting for approval and payment a claim against the Government (it was also charged as a claim against the War Department and as a claim against the Treasurer of the Military Academy) which claim was fraudulent in overcharging the Cadet Mess $819.26 for provisions. It should be noticed that the account upon which the claim was based as set out in the indictment was against "The Cadet Mess."

2d. Grand larceny in the second degree, as known to and defined by Sections 528 and 531 of the Penal Code of the State of New York, of the above sum of $819.26, alleged to be the moneys of the cadets of the Military Academy, which larceny was effected by the payment of the above fraudulent claim.

Upon this consolidated indictment the cause came on for trial and defendant was convicted. He then moved in arrest of judgment, which was denied and defendant was sentenced to serve two years

and six months in the Federal Penitentiary at Atlanta, Georgia.

The objections presented by the several demurrers and the motion in arrest interposed by defendant present upon the record the questions of law for the consideration and decision of this Court.

Defendant then prayed for a writ of error to this Court, upon constitutional and jurisdictional grounds, which was allowed and certified; citation was duly issued, assignment of errors filed, and due service made. Defendant then moved for a supersedeas and admission to bail pending the determination of the proceedings in error.

Over the objection of the United States attorney that bail after conviction is contrary to the practice of the judges, both State and Federal, in this district, and should not be allowed except when reasonable doubt is entertained of the merits of the conviction, the supersedeas was granted staying the sentence, and defendant was admitted to bail in the sum of ten thousand dollars, and until such time as he could make further application to this Court.

The court below then fixed the 3d day of January, 1910, as the time for making said application to this Court; but for good cause shown, this time was subsequently extended to include the 17th day of January, 1910, and the court again admitted defendant to bail in the same sum to cover this extension.

The transcript of the record in the court below has been filed in this Court and the cases docketed. The case is at present before this Court on the motion of plaintiff-in-error, after due notice given, for admission to bail by this Court pending the determination of the proceedings in error, all of which is in compliance with the orders and opinion of the honorable court below.

I.

It is reasonable to assume that this Court will not hesitate to admit plaintiff-in-error to further bail, in view of the action and opinion of the Trial Judge.

It cannot be denied that had the trial judge refused to admit defendant to bail—and such refusal generally furnishes the necessity for the application to this Court—that fact would be entitled to some consideration here. But with the facts before him, with an opportunity to inform himself as to all phases of the proceedings, and to observe the defendant, the trial judge, after disposing of the contentions of the Government and showing that the cases where bail had been refused or reluctantly granted relied on as controlling precedents in that district, turned upon the point whether under circumstances any bail could be fixed sufficient to secure appearance, says, in his opinion on admitting defendant to bail:

> "Therefore, I feel obliged to endorse upon the citation that the writ of error shall act as a supersedeas, and the question becomes simply whether bail should be taken. *I have little doubt that a bail of ten thousand dollars ($10,000) will insure his appearance in case of an affirmance of the conviction, and it seems to me that the defendant in that case has the right to have bail fixed.* As, however, the question of the custody of the defendant, pending the proceedings in error, seems under *McKnight v. United States*, *supra*, to be more properly for the appellate court, I shall make his bail returnable at the

end of such time as will enable him to apply to the Supreme Court for bail."

The learned Judge, on January 3d, 1910, extended the time for making the application, and again without question admitted defendant to bail in the same sum and with the same conditions.

The Government, in the court below, did not question, but on the contrary the United States Attorney distinctly and frankly admitted, that bail would insure the reappearance of defendant in case of an affirmance of the judgment by this Court. He also stated that he entertained no doubt but that the defendant would present himself to serve his punishment should the decision of this Court be adverse to his contentions; and that so far as the mere matter of appearance was concerned one amount was as good as another, and that even a parole in custody of counsel would doubtless be equally effective.

II.

The plaintiff in error should as a matter of legal right be allowed further bail by this Court pending the writ of error.

(McKnight *v.* The United States (C. C. A. 6th Cir., February 10, 1902), 113 Fed. Rep., 451; Hudson *v.* Parker, 156 U. S., 277).

In McKnight *v.* The United States, the plaintiff-in error had been tried and convicted three times on the same indictment for embezzling funds of a national bank. On his third conviction he applied,

after writ of error allowed and citation served, to the judge who tried the cause for bail, which was denied. He then applied to a judge of the Circuit Court of Appeals who, preferring that the application should be made to the court, suggested to the trial judge the propriety of admitting the petitioner to bail until the court should hear the application. This was done. The opinion of the Circuit Court of Appeals was delivered by Lurton, Circuit Judge. Two of the judges of that Court are now justices of this court. The Court, after showing that the writ of error operated as a supersedeas, and that the Circuit Court of Appeals, or any of its judges, had full power to allow bail, took up the question of the propriety of allowing it in such case. The Court say (p. 453):

> "The granting of the writ of error in itself stays the execution of the sentence of the Trial Court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in Hudson *v.* Parker, cited above, the Court said:
>
> "'The Statutes of the United States have been framed upon this theory; that a person accused of crime shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.'
>
> "The fact that bail has been refused by the trial judge, though not conclusive, is a

> fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the Appellate Court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ of error. We quite agree agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction."

The Court further decides that the fact that the defendant had already been three times convicted upon the same indictment was not a sufficient reason for denying bail, and the application was granted.

In Hudson *v.* Parker, 156 U. S., 277, Mr. Justice White of the Supreme Court granted a writ of error and a supersedeas to Hudson, who had been convicted of an assault with attempt to kill, and fixed his bail, pending the writ of error, at $5,000. The judge who tried the cause refused to obey the direction to admit Hudson to bail, and the case came before the Supreme Court on a petition for mandamus.

The Supreme Court upheld the power of the judges of that Court to admit to bail pending the writ of error. In the opinion of the Court, written

by Mr. Justice Gray (pp. 284-285), the following statements are made:

> "In Claasen's case, it was held, in the case of an infamous crime, the writ of error was a matter of right, and that no security, such as is necessary in a civil case, was required. The only 'proper security,' then, in a criminal case, is security for the appearance of a prisoner admitted to bail. Within the very terms of the rule, therefore, any justice of this Court, although not assigned to the particular circuit, would seem to have the power to permit bail to be taken. But the power rests upon broader grounds.
>
> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

III.

The stay of execution already granted to the plaintiff-in-error is a matter of right, and necessary to protect the right of appeal to the court of last resort, when bail can be fixed.

Section 1007 of the Revised Statutes provides that if a writ of error be taken out within sixty days, a supersedeas follows upon the giving of security.

In re Claasen, 140 U. S. 200, at page 208, this Court, after stating the manner in which a supersedeas may be obtained in accordance with the above section, says:

> "But, as there is no security required in a criminal case, the *supersedeas* may be obtained by merely serving the writ within the time prescribed, provided the justice who signs the citation directs that the writ shall operate as a supersedeas, which he may do when no security is required to be taken."

This Court, on page 209 of its opinion in that case, uses the following language:

> "The order made hereon in the present case will allow the Circuit Court, or any justice or judge hereof, in its or his discretion, to admit the defendant to bail, after the service of the citation, in such amount as may be fixed."

These words must consistently refer to the question of bail following the supersedeas and likewise the discretion referred to must mean the discretion

to determine whether any bail will secure appearance.

It should also be remembered that the words used in Rule 36 of the Supreme Court are as follows:

> "He may also grant a supersedeas and stay of execution or of proceedings,"

The meaning of this rule and of the word "may," which is the crux of the matter, can, in my opinion, be no better and more reasonably expressed than is done in the opinion of the Honorable Court below, where he says:

> "Now it is my understanding that the word 'may' when used, at least in a statute, will be construed as 'must' whenever the power conferred is 'for the sake of justice,' by which I understand no more than that the power is given in the administration of justice. The earliest case which I can find of this construction of 'may' as 'must,' is Rex *v.* Barlow, 2 Salkeld, 609 (1693), which has been cited scores of times. Singularly enough, that case, which is apparently the origin of the rule, refers to a still earlier case, not reported, in which the power to take bail is construed as mandatory when given to a sheriff by the word 'may.' The language used is as follows:
>
> "'Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall;' thus 23 Henry VI. says the sheriff may take bail; this is construed he shall; for he is compellable to do so.'
>
> "This case has been consistently followed to the present time, though the precise

words 'for the sake of justice' are not always used; though, see Mitchell *v.* Duncan, 7 Florida, 13, 21. In Mason *v.* Ferson, 9 Howard, 248, 259, the Court uses language equally covering this case as follows:

"'Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third parties.' Again: 'What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do.' All this language was essential to the decision."

In Supervisors *v.* United States, 4 Wallace 435, 447, Mr. Justice Swayne says:

"What they (public officers) are empowered to do for a third person the law required shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice."

In People *ex rel.* Bank *v.* Supervisors, 51 New York 401, the same rule is enforced and a number of authorities cited. In People *ex rel.* Conway *v.* Supervisors, 68 New York, 114, 119, the Court says:

"Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'must.' Dwarris on Statutes, page 604, lays down the same rule, and I think that where there is an ambiguity, the doubt must be resolved in favor of the statute's being manda-

> atory. A rule of an appellate court should be subject to the same construction."

1. *Admission to bail after conviction in the Federal Courts and pending a writ of error is a matter of discretion limited simply to the question of securing the personal appearance of the plaintiff in error.*

This proposition follows from the law regulating the right to a writ of error, where allowed at all, and a stay of execution pending its determination. This Court settled it beyond all question when in Hudson *v.* Parker, *supra*, at page 285, it used the following language:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

And equally strong and impelling is the language in McKnight *v.* The United States, *supra*, at page 453, where the Court says:

> "The granting of the writ of error in itself stays the executing of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief."

2. It was argued on behalf of the Government in the Court below that the judge admitting defendant to bail after conviction should have a reasonable doubt of the legality of the conviction.

Several cases in the New York courts were mentioned incidentally in support of this proposition. It is hardly necessary to point out to this Court that the provisions governing the granting of certificates of reasonable doubt by the State Courts of New York, are statutory; and it is equally unnecessary to point out that Congress has never adopted the policy embodied in the legislation of this State with respect to such certificates as a condition precedent to the right of appeal from a judgment in a criminal case.

As stated by this Court in *Hudson* v. *Parker*, the policy of the United States since 1889 in capital cases, and 1891 in all other criminal cases, has been to allow the writ of error as a matter of right.

Two Federal cases in the Southern District of York were likewise mentioned in argument in support of the above proposition. One was an application on the part of Charles W. Morse, the convicted New York banker, in which Judge Hough, the trial judge, refusing bail, used the following language:

> "In this case there are the further considerations that in the case of Morse no amount of bail ever demanded in any instance known to me would insure his attendance if he wished to escape. * * *
>
> "By this testimony the applicant has boasted of wealth of 22 million dollars, and to hold such a man to bail by money, is absurd."

This shows that the consideration uppermost in the mind of the court was the inability to secure appearance by any bail whatsoever. Judge Hand,

in disposing of this case, in passing upon plaintiff in error's motion, says in his opinion:

> "There is no evidence that upon the first consideration any other question was before the court than the likelihood of bail insuring appearance."

Upon application to the Circuit Court of Appeals, bail was, however, even in this case granted.

Another case referred to was The United States *v.* Kavenaugh, in which Judge Hough, in an unreported opinion, declined to allow bail, of which, when applied to the present case, Judge Hand said:

> "It is quite possible to read the decision as meaning no more than that under the circumstances Kavanaugh might abscond and forfeit his bail."

It was further said by the United States Attorney in the court below that the court should follow the trend of modern thought and give heed to present public opinion respecting criminal procedure, and refuse the application for bail.

Needless to say such argument was uneffectual. Public opinion has not troubled itself with this petty case; even had it done so, public opinion is poor law, until it manifests itself in a legislative enactment. The same can be said of modern thought respecting criminal procedure, whatever that term may mean. As was said by Ward, Circuit Judge, in an unreported opinion in the case of Haas *v.* Henkel, Marshal, Southern District of New York, on Haas' application for bail pending an appeal to this Court after having been remanded on habeas corpus to await removal proceedings:

> "If this practice causes prejudicial delay in criminal prosecutions, it results from the pro

visions of Section 1014 Revised Statutes, and relief should be sought, not from the courts, but from Congress, as Attorney Generals Moody and Bonaparte have suggested in their annual reports, 1905–1907."

In United States *v.* Louis et. al. 149 F. R. 277, it was decided that Section 1015, Revised Statutes, authorizes admission to bail at any stage of the proceedings *before or after* hearing, indictment, or conviction, and pending appeal.

So long as Sections 1014, 1015 and 1016, Revised Statutes, and the decision cited and quoted herein, remain the law of the land, so long, we venture to hope, will this Plaintiff-in-Error, still retaining enough friends to provide him bail, be entitled to test his conviction in the Court of last resort, before undergoing punishment on a conviction which the law says he has the right to test.

And regardless of the statutes, it is futile to say that such is not likewise the policy of the English common law.

Stephens History Cr. Law England, I. pp. 233, 243.
Church on Habeas Corpus, p. 445.
Rex *v.* Bishop, Strange, 9.
King *v.* Mayor Salbash 2 Show, 96.

IV.

It appears to have been the almost universal custom for the Circuit Courts or the Circuit Courts of Appeals, and the Supreme Court while it had jurisdiction, to allow bail upon writs of error to review convictions for crimes like and analogous to this of which plaintiff in error stands convicted.

So far as time and opportunity have permitted an examination and inquiry into the records of this and the other Appellate Federal Courts not a single instance is found where bail has been denied in cases like or similar to the one under consideration.

A brief examination and inquiry into many of the more important cases give the following information:

In Moore *v.* The United States, 160 U. S., 266 (1895), Moore, a clerk in the Post Office at Mobile, Alabama, was indicted and convicted for stealing and embezzling $1,652.59 moneys of the United States. The sentence was two and a half years, with bail pending the writ of error to this Court in the sum of $2,000.

In Bridgeman *v.* The United States, 140 F. R., 577, Circuit Court of Appeals, Ninth Circuit (1905), Bridgeman, an Indian agent in Montana, was indicted and convicted for the same offence as this plaintiff-in-error, sentenced, and was, I am informed, admitted to bail.

In Coffin *v.* The United States, 156 U. S., 432 (1895), and 162. U. S., 664, defendants were convicted of aiding and abetting in the misapplication

of funds of the Indianapolis National Bank, sentenced to five and ten years, and admitted to bail in the sum of $25,000 by Mr. Justice Harlan, pending the writ of error.

In Dickinson *v.* The United States, District Court of Massachusetts, 1906, Dickinson, was convicted of misapplication of funds of national bank funds, sentenced to nine years, and admitted to bail in $15,000 pending writ of error.

In the important cases of Allis *v.* The United States, 155 U. S., 117, and Cochran *v.* The United States, 157 U. S., 286, and in the very recent and much more important cases of The United States *v.* Charles W. Morse, the convicted New York banker, which latter conviction occurred in the Southern District of New York, and of the United States against Walsh, the convicted Chicago banker, the several plaintiffs-in-error were all admitted to bail pending the writs of error.

All the above cases involved large sums and some of them stupendous amounts, while the amount involved in the case under consideration was less than a thousand dollars. And in several of the cases cited the financial condition of the applicants for bail must have been one of opulence; unlimited wealth renders life comfortable in whatever lands, and offers an inducement to seek them in preference to the harsh alternative, while the present applicant is penniless, with nothing left but his head and hands with which to labor for a helpless wife and four still more helpless children.

V.

If on this application the Court should require the plaintiff in-error to satisfy it that there is reasonable doubt of the correctness of the proceedings on the trial, it will not be difficult to show that there are questions involved here of great gravity and of the highest importance to the whole military establishment.

I feel confident of having shown in the discussion of the preceding points that the question of reasonable doubt of the legality of conviction has no place in the laws of the United States governing admission to bail pending proceedings in error in the federal appellate courts. I rely, without misgiving, upon the language of this Court in Hudson *v.* Parker and the decision in McKnight *v.* The United States. Nor does the fact that plaintiff-in-error pleaded guilty in the court below, after having placed upon the record in due form his objections to the proceedings, change the situation. These defects in the indictments of which he complained cannot be cured by verdict or plea, nor can jurisdiction over the subject matter be conferred by act of the defendant upon a court that has no jurisdiction under the law.

That the Court may, if it desire, apprehend the character and importance of the legal questions involved, its attention is invited to the indictments, the demurrers thereto, and the motion in arrest. Neglecting all defects which are either plainly or even doubtfully defects of form, and cured by verdict, and regarding as admitted under the plea every fact which is or may be well pleaded, there

remain the following fatal defects objected to on the record:

A. Under Section 5438:

1. The Superintendent or the Treasurer of the U. S. Military Academy is not such an officer with authority to approve said claims, as is contemplated by this section, because

(*a*). He has no legal authority whatever either by statute or regulation to make such approval.

(*b*). His approval or disapproval can in no wise under the law affect the treasury of the United States, since the funds claimed against are private, are alleged to be so, and the United States has no title in them whatever.

2. The Cadet Mess is no part of the Government of the United States, nor is it a department or officer thereof, within the meaning of Section 5438, or any other law of the United States.

3. Each of the counts contains a fatal repugnance, in that the claim as set out is a claim against the Cadet Mess whereas the claim is alleged to be a claim against the Government of the United States.

4. Admitting the truth of every fact that is well pleaded, yet no count in this indictment is sufficient to charge a crime against the United States.

B. Under the Act of July 7th, 1898:

1. That said Act is unconstitutional and void because

(*a*). It is a delegation by Congress of their legislative powers to the several State Legislatures.

(*b*). It is not a rule, but prescribes different and unequal punishments for the same offence when committed in the several different States of the Union.

2. The Circuit and District Courts have jurisdiction over the offence (defined by State law) attempted to be adopted by the said Act only when "the punishment for such offence is not provided for by any law of the United States." The offence charged by this indictment—embezzlement—when committed by an officer of the Army is punishable by a court-martial under Article 62, Section 1342 Revised Statutes.

3. The capacity of the defendant wherein he had possession, custody and control of the said funds is not sufficiently alleged.

Such are some, among others, of the questions of law raised upon the record and presented to this Court for its decision, the determination of which may well lead, and it is believed will lead, to a reversal of this judgment.

If this Court should decide that its determination of the present application in favor of the plaintiff-in-error must depend upon satisfactory evidence of reasonable doubt of the legality of the proceedings, counsel respectfully asks leave to file a further memorandum taking up the questions involved more carefully. In the pressure of the case it has been practically impossible to do that yet.

JANUARY 10th, 1910.

S. T. ANSELL,
Counsel for Plaintiff-in-Error.

PLAINTIFF'S BRIEF

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 736.

THOMAS FRANKLIN, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

HOLMES CONRAD,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 736.

THOMAS FRANKLIN, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

This case is here on error to the Circuit Court of the United States for the Southern District of New York.

It is brought on to be heard now on a motion made by the United States, through their Solicitor General, to be dismissed or affirmed, under the fifth section of the sixth rule of this court. The motion to dismiss rests on the ground that "the writ of error was taken for delay only." The motion to affirm rests on the ground that "the question on which the jurisdiction depends is so frivolous as not to need further argument."

The plaintiff in error replies briefly to these several grounds of the motion by stating that, as to the purpose of "delay," he will unite with the Solicitor General in a motion to the court to advance the case, and set it down for argument at the earliest day the court may be willing to hear it, and as to the ground of the question brought here for review being "frivolous," that will be readily disposed of by the case presented by the record.

The Case.

Three indictments are here shown, on which the accused was tried and convicted.

To each indictment, and to each count of the several indictments, demurrers were interposed by the defendant, which were all overruled by the court.

The grounds of error assigned here to the judgment rendered by the court are to be found in the indictments alone, and are indicated in the grounds on which the several demurrers were based.

Taking these three indictments in the order in which they appear in the record, I will indicate briefly the features in which, in my judgment, they are so plainly defective as to warrant the court in reviewing the judgment.

The First Indictment

will be found on pages 4-16 of the transcript, and rests alone on section 5438, R. S. It charges that

> "Thomas Franklin, * * * at West Point, New York, in the district and circuit aforesaid, unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, viz., to Albert L. Mills, then and there Brigadier General in the Army of the United States, and Superintendent of the United States Military Academy at West Point, New York, in the district and circuit aforesaid, for approval by the said officer as such Superintendent aforesaid, he, the said Albert L. Mills, as such Superintendent, being then and there authorized to approve the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy aforesaid, and which said

claim was in the words and figures following, to wit," (Here follows the claim.)

The indictment then proceeds—

> "and which said claim, at the time and place when and where it was so made and presented and caused to be made and presented, was false, fictitious and fraudulent in the following respects, to wit, he, the said Thomas Franklin then and there well knowing the same to be false, fictitious and fraudulent in the following respects, to wit, in that the items therein under the date of May 26, 1906, 'to 6 bbls. of apples, at $7.00, $42; to 10 boxes onions, at $2.00, $20.00; to one bag carrots, $.75; to one box green peppers, $4.00, should have been instead thereof respectively 6 bbls. apples, at $6.50, $39.00, &c., &c.' "

Then follows a list of the same items as in the "claim" presented by Franklin, but showing as to each item a different, and in each item a smaller, cost price than shown in the "claim," but preceded as to each by the charge "should have been instead thereof respectively," the indictment concluding

> "that the said Thomas Franklin neither had in truth nor in fact paid any sum whatever for cartage upon the articles covered by the said account, &c."

The three several counts in this indictment are alike as to the charges, but differ as to items and as to dates.

ARGUMENT.

The indictment is insufficient on the following, among other grounds, viz:

1. It does not charge that any official or fiduciary duty was laid upon the defendant, or that he was under any obligations to keep or render any accounts, or to purchase the supplies here referred to, or that he was using any money belonging to any one but himself, or, in short, that what he

is alleged to have done or left undone was in violation of any trust or duty or obligation laid upon him by any office or employment which he had undertaken.

2. It charges that Mills, as Superintendent, was "authorized to approve the same," but it does not charge how, or by whom, or in what manner, he was so authorized; whether such authority was derived from a law of the United States, or a regulation of the Military Academy, or by Franklin himself. The defendant is not apprised of the source of such authority, and so had no opportunity or means of testing the accuracy of the charge and of disproving it.

3. It charges that the claim presented by Franklin, and approved by Mills as Superintendent, was "a certain claim upon and against the United States," but it charges no facts which tend to show that the claim or the account so presented was against the United States, but it does charge and show that the account as made out and presented was "The Cadet Mess to Thomas Franklin, Dr." It does not charge what "the cadet mess" was or what connection, if any, it bore to the United States, or that the United States had any the least interest in or control over or property rights in the provisions indicated in the items of the account.

4. It does not charge or even intimate that the defendant, Franklin, had charged in his accounts a greater price for the articles embraced in the account than he had paid therefor and was seeking by the account to demand and receive credits for more money than he had actually expended. The charge is that he had presented an account for articles at a certain price, and that the items "should have been instead thereof respectively," &c., a different and smaller price than that so charged by him. But why *should they have been?* The charge, taken altogether, is consistent with the view that Franklin had paid more for the

articles than he should have done; that he had bought them in a high market when he might and should have bought them in a cheaper market. There is no fact charged in the indictment which tends to show that Franklin had enriched himself or had sought to enrich himself by his dealings. The charge is altogether consistent with the view that he had been extravagant and imprudent in his purchases and had paid more for the articles than he should have done.

5. In his printed motion the Solicitor General states the charge made in this indictment as

> "the embezzlement of certain personal property of the cadets at the United States Military Academy, upon a Government reservation * * * in violation of section 5391, R. S., as amended by the act of July 7, 1898, and of sections 528 and 531 of the New York Penal Code" (Motion, pages 1-2).

The indictment on its face purports to have been found under section 5438, R. S. The effect of the several statutes will be considered later on.

The Second Indictment

will be found on pages 16-49 of the transcript, and purports on its face to have been found under section 5438, R. S., and contains twelve counts.

The first, second, and third counts are the same as in the first indictment, except that in these the claim is described as

> "a certain claim upon and against a department of the United States that is to say a certain claim upon and against the Department of War of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy aforesaid, and which claim was in words and figures following to wit," &c.

The fourth, fifth, and sixth counts present a wholly different charge, and one inconsistent with the other counts and with the first indictment. After following the language of the former counts to this point, it proceeds as follows, viz:

> "A certain claim upon and against an officer of the United States, that is to say, a certain claim upon and against the said Thomas Franklin, who was then and there a captain in the military service of the United States, detailed for duty at the United States Military Academy at West Point, New York, in the district and circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, and was then and there acting as such Treasurer, and who was the officer charged with all matters relating to the pay and accounts of the cadets at the said United States Military Academy, and with the duty of paying for the provisions purchased for the use of the cadet mess at the said United States Military Academy, which said claim was upon an account purporting to be the account of him the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the cadet mess of the United States Military Academy, aforesaid, in the words and figures following, to wit."

We pause here for a moment to invite attention to the views expressed by the learned judge who presided at the trial in the lower court, in an opinion delivered by him in overruling a demurrer to the next indictment (Transcript, page 62). He said:

> "I do not mean in the least to reflect upon the wisdom of the counsel who filed these demurrers. To our great discredit, as I think, technicalities of the kind it raises have been too often successful to permit conscientious counsel to forego their trial whenever his ingenuity devises them. Their success does not redound to his disadvantage, but to the court which has been misled. Any honest reasoning is quite legitimate, and the responsibility for mistakes must rest upon the court. Nevertheless, I cannot resist saying

> that to adopt the construction which is suggested, would, in my judgment, be to pervert the obvious meaning of the act quite unpardonably, and that too, by a metaphysic which is fatuously verbal and naively unpardonable," &c.

The bench and bar of the United States have, in recent years, protested against the release of accused persons from deserved punishment, through mischievous delays and pernicious technicalities, and have suggested the means for the correction of such abuses, and yet it cannot be overlooked that many of the so-called technicalities employed in the defense of accused persons have been made necessary by the unskillful, if not designedly inapt and inadequate, language used by prosecuting officers in framing the charges on which the accused person is to be tried. Men should not be exposed to degrading charges and punishments; they should not be subjected to the disgrace of arraignment and trial on criminal charges which are but traps set by the prosecutor for the feet of the accused and his counsel, stated in inapt, inadequate, ambiguous, and equivocal language.

The foregoing count illustrates this view.

We have seen that the first indictment charges the making and presenting of what it called "a certain claim upon and against the Government of the United States" by the defendant, who is not charged with having any duty whatever laid upon him. The second indictment, in the first three counts, substantially repeats this charge. The fourth, fifth, and sixth counts depart from this charge, and make the further charge that it was "a certain claim upon and against the said Thomas Franklin," and they charge that this Franklin was "a captain in the military service of the United States, * * * detailed as Treasurer of the United States Military Academy at West Point." It further charges that he was the

> "officer charged with all matters relating to the pay and accounts of the cadets at the said Military Academy, and with the duty of *paying for the provisions*

> *purchased for the use of the cadet mess* at the said Military Academy, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, *for provisions furnished by him to and for the cadet mess* of the United States Military Academy," &c.

That is, it charges it to have been the duty of Franklin, as treasurer, *to pay for the provisions purchased,* but it does not charge it to have been the duty of Franklin *to make such purchases,* and yet the gravamen of the charge in the indictment is, that Franklin has been guilty of presenting false, fictitious and fraudulent vouchers for the purchase and cartage of provisions, when nowhere is it charged that it was any part of his duty to furnish such provisions and their cartage. No charge is made as to any dereliction of his duty as treasurer in any of the particulars as to which *his duty as such treasurer is charged.* The only duty charged against him, so far as the cadet mess is concerned, was to pay for the provisions purchased for the use of that mess.

The seventh, eighth, ninth, tenth, eleventh, and twelfth counts of this indictment present a quite different charge from either of the foregoing. They charge that

> "Thomas Franklin, yeoman, * * * unlawfully did make and present and cause to be made and presented to an officer in the military service of the United States, to wit, to him, the said Thomas Franklin, who was then and there a captain in the subsistence department of the Army thereof, and an officer in the United States Military Academy at West Point, New York, in the district and circuit aforesaid, and who had been duly detailed as Treasurer of the said United States Military Academy, for payment by said officer as such treasurer, being the officer authorized to pay the same, a certain claim upon and against the Government of the United States, which said claim was upon an account purporting to be the account of him, the said Thomas Franklin, for provisions and cartage therefor, furnished by him to and for the

> cadet mess of the United States Military Academy aforesaid, and which said claim was in the words and figures following, to wit:" &c.

The charge here made fully recognizes the validity of the objections heretofore urged to the foregoing indictment and the foregoing counts in this indictment, and the attempt is now made to avoid those objections by another and wholly different charge. The attempt is as futile as the previous charges.

The charge is that Thomas Franklin, in the character of purveyor for the cadet mess, furnished provisions and cartage for such mess, and presented an account therefor to Thomas Franklin, Treasurer of the Military Academy, for payment by such treasurer,

> "he, the said Thomas Franklin, as such treasurer, being the officer *authorized to pay the same,* a certain claim upon and against the Government of the United States," &c., * * * "he, the said Thomas Franklin, then and there knowing the same to be false, fictitious and fraudulent in the following particulars," &c.

There is no charge that Thomas Franklin, treasurer, paid a claim which he knew to be fraudulent, &c., but that Thomas Franklin, purveyor, presented such a claim to himself as treasurer.

Does this mean that Franklin as purveyor attempted to deceive and defraud himself as treasurer? The crime, if any, must be in the fact that the claim was so presented with intent to deceive and defraud. But is it not mere trifling with the court to say that a man intended to deceive and defraud himself? Could Franklin as treasurer be deceived by a claim presented by himself as purveyor?

Further, the charge is that he, "being the officer *authorized to pay the same.*" Not authorized to pay valid claims, but authorized to pay *the same*—that is, to pay this claim, which he knew to be invalid. This may appear to

be the veriest trifling with words, or, as Judge Hand expressed it, "a metaphysic which is fatuously verbal and naively nonsensical," and yet it is the very charge made in the indictment, and, on demurrer, is entitled to serious consideration by the court, because it is on this charge that Captain Franklin has been tried and convicted.

No charge is made that Franklin was authorized to purchase provisions for the cadet mess, or that it was his duty to do so, nor is there any charge that he did actually furnish provisions for that mess. The charge is that he, having no authority to do so, and being under no official obligation to do so, did present an account as for provisions furnished, and that the items of such account were of certain prices, and the count charges that they "should have been instead thereof" of certain other prices.

If the indictment had charged that an irresponsible stranger had presented an account for beef at ten dollars a pound, without charging that he had furnished the beef or was under obligation or duty to furnish beef, or that he had made any false representations as to the price, or had deceived any one in the matter, could that furnish ground for a criminal charge? How could it do so, if the charge was that the stranger had presented such account to himself?

The Third Indictment

appears on pages 52-58 of the Transcript and purports to be founded, as to the first, second, and third counts, on section 5391, Revised Statutes, and as to the fourth, fifth, and sixth counts on chapter 576, Act of July, 1898 (30 St., 717), and on sections 528 and 531, Penal Code of New York.

The first three counts appear to have been nolleprossed (Record, page 58), and the trial proceeded on the remaining counts. These counts charge as follows:

That West Point is under the exclusive jurisdiction of the United States; that Franklin was Treasurer of the Military Academy.

"That then and there, as such treasurer, having in his possession, custody and control, certain goods, chattels and personal property of all the cadets then forming the Cadet Corps of the United States Military Academy at West Point, aforesaid, the names of which cadets are to the Grand Jury unknown * * * reference is made to the muster rolls of said United States Military Academy, on which appears a list of the said cadets, the true owners thereof, to wit, the same goods, chattels, and personal property mentioned, described and set forth in the first count of this indictment, reference to which is hereby made, of the value mentioned, and set forth therein, did feloniously appropriate the said goods, chattels and personal property to his own use with intent to deprive and defraud the said cadets aforesaid of the same, and of the use and benefit thereof, and the same goods, chattels, and personal property of the said cadets aforesaid, did then and there and thereby feloniously steal."

These three indictments were, by order of the court, consolidated and the defendant was tried thereon, as on one indictment (Record, page 58).

The first indictment charged him with presenting a false and fraudulent claim "upon and against the Government of the United States."

The second indictment charged him with presenting a false and fraudulent claim "upon and against the said Thomas Franklin."

The third indictment charged him with stealing the property of the cadets.

To these three indictments, charging wholly different crimes, committed against wholly different persons, at different times, this defendant was required to join issue and put himself on trial, as on one indictment.

Interesting and very important questions, extending in their operation and results far beyond the personal interest of the individual immediately concerned are presented here, the most important of which relate to the construction and

effect to be given to the several statutes which are relied on as affording the foundation of these indictments.

The Statutes Relied on.

The power of Congress to legislate as to places ceded to the United States is derived from article 1, section 8, of the Constitution, which provides that—

> "The Congress shall have power * * * to exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," &c.

Congress, in the exercise of this power, it is assumed, in 1825, enacted the law that now appears as section 5391, R. S., which provides that "if any offense be committed," etc. An offense is the doing what some penal law forbids to be done, or the omitting to do what that law commands to be done.

When section 5391 speaks of an "offense" being committed, it becomes pertinent to enquire, By what law has the act charged been made an "offense"? Against the law of what jurisdiction does it offend? No statute law of the United States has been found under which the acts charged in these indictments have been declared to be offenses.

> "Before an offense can become cognizable by the United States courts, so it is concluded, Congress must first recognize it as such, affix a punishment to it, and declare the court that shall have jurisdiction" (Wharton, Crim. Law, sec. 253, citing cases).

In United States *v.* Lacher, 134 U. S., 628, this court said:

> "There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But, though penal laws are to be construed strictly, yet the intention of

> the legislature must govern in the construction of the penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature."

In Pettibone *v.* United States, 148 U. S., 203, this court said:

> "The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they resort to the common law for the definition of the terms by which offenses are designated."

In *Ex parte* Smith, 94 U. S., 456, this court said:

> "The facts upon which the jurisdiction of the courts of the United States rest, must appear in some form, in the record of all suits prosecuted before them. To this rule there are no exceptions."

Neither section 5391, R. S., or the act of July 7, 1898, declare the acts here charged to be offenses. They do not create any offense. They only refer in express terms to acts which, by some law, have already been declared to be offenses. They each begin, "When any offense is committed," etc. By what statute of the United States is the embezzlement of property of the cadets at West Point made an offense against the United States? Embezzling the property of the United States is undoubtedly an offense, but the property of the cadets is not the property of the United States. Nor can the statute laws of New York create offenses against the United States any more than the statute laws of the United States can create offenses against the State of New York. The acts charged may be offenses under the laws of the State of New York, but they are not, for that reason, punishable by the United States.

Nor does the act of July 7, 1898, involve any such incongruity. It merely provides that where an act is committed which, by the laws of the State in which committed, is an

offense, and a punishment for such offense is prescribed by the laws of that State, but no punishment for such offense is prescribed by the laws of the United States, then, when such act has by the laws of the United States been made an offense against the United States, it shall receive the same punishment as is prescribed by the laws of the State for the like offense, when committed within such State. But the act must have been previously declared by the laws of the United States to be an offense against the United States. The act does not purport to adopt the penal codes of the several States of the Union as penal laws of the United States as to all acts done on Government reservations within the States.

The whole question of the jurisdiction to try and punish for offenses committed within Government reservations was fully discussed and illustrated by many cases in the opinion of the court delivered by Mr. Justice Field in the case of Fort Leavenworth R. R. Co. *v.* Lowe, 111 U. S., 525.

In Virginia *v.* Paul, 148 U. S., 107, this court, speaking through Mr. Justice Gray, said:

> "A grand jury, whether of the State, or of the United States, is empaneled and sworn to inquire into and present offenses against that government only under whose authority it is summoned. Story on Constitution, sec. 1784. The grand jury summoned and empaneled under the authority of a State is the only appropriate body to inquire into any offense against the State, and to find or ignore an indictment therefor. The duty of a grand jury attending a court of the United States is limited to inquiring into and presenting offenses against the laws of the United States, and its proper advisers in matters of law are the court and the attorney of the United States."

This motion to dismiss or affirm is set for Monday, the 21st instant. Did time allow me, I would search for the reports of the committees of the Houses of Congress by which these several bills were reported, and ascertain for the infor-

mation of the court what mischief was sought to be remedied by these acts and what scope the acts were intended to have. That they were loosely drawn, and are vague and indefinite and uncertain in their language, is conceded by the lower court, and is evident on their face. But that they intended to adopt the penal laws of all the States of the Union as penal laws of the United States in the several States cannot be lightly assumed, especially in a case involving such grave consequences to an officer of the Army as those which are imminent here.

That the questions involved are so manifestly "frivolous" as to warrant the court in affirming the judgment below, without hearing argument, is sufficiently answered by even the superficial examination of the case that I have been able to present, which discloses substantial grounds for serious doubt as to whether any ground existed for the jurisdiction of the court before which the plaintiff in error was tried and convicted.

As to All the Indictments.

The first and second indictments state no conduct on the part of Franklin that was immoral or improper, far less criminal.

They charge that Franklin presented an account, or "claim," which they charge to have been false, fictitious, and fraudulent. Those are opprobrious epithets that shed no light on the facts charged. No *facts* are charged which even tend to fix this character on the claim so presented.

They do not charge that Franklin bought or claimed to have bought the provisions, or that he used the money or credit of any person other than himself in making such purchases, or that he was under obligation or duty to make such purchases or render any account, or that he was authorized or undertook to make such purchases as the agent of the cadet mess or other person, or that he made any false representation, sign, or token in the account or claim so

presented by him with intent to deceive and defraud any person.

The charge that the cost or the price or the amount charged by Franklin was one amount, while it *"should have been instead thereof"* another amount, does not charge or raise a suspicion of wrong-doing on the part of Franklin.

The learned judge who presided in the lower court, in overruling the demurrer on this ground, said:

> "It is captious to quarrel with the phrase, 'should have been.' Everybody knows that this is intended to cover the prices paid by the defendant. It is clear that they charge him with putting in bills what he said he had paid. To hold otherwise would be to introduce needless perversity into such matters" (Record, page 51).

But the court is not a mass meeting in which questions are carried by a show of hands. Especially in a case where one is charged with the commission of crime is he entitled to have the charge stated so definitely and distinctly as to leave no material feature to be taken for granted. In the case of Pettibone *v.* United States, 1448 U. S., 197, this court said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital."

It is altogether consistent with all the facts charged in these indictments that Franklin had purchased the provisions and paid for them a higher price than he could have purchased them elsewhere, and that when it is said they "should have been" otherwise it is meant that he should have purchased them at the lower price. It is consistent with all the facts charged that Franklin, being under no official

or other obligation to purchase provisions for the cadet mess, did so voluntarily and on his own account, and that having purchased them at one price he put them in, in his account or claim, at a higher price, claiming that he was entitled to the additional charge as his profit in the business.

If the facts can support any theory consistent with innocence, the defendant is entitled to the adoption of that theory. Every presumption is in his favor, and he is entitled, even on demurrer, to the benefit of every reasonable doubt.

I gladly adopt as part of this brief some of the views presented by Captain S. T. Ansell, U. S. A., who, by permission of the War Department, appeared and conducted the defense in the lower court, and on the motion for bail in this court, until called off by the withdrawal of the permission granted him by the War Department.

On March 3, 1825, Congress passed:

Chap. LXV.—An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.

> "SEC. 3. That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State."
>
> Vol. IV, Stat. L., p. 115; approved March 3, 1825.

In 1866 Congress enacted the following:

Chap. XXIV.—An act more effectually to provide for the punishment of certain crimes against the United States.

"SEC. 2. That if any offense shall be committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such place is, or may be situated, now in force, provided for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any of the courts of the United States."

Vol. XIV, Stat. L., p. 13; approved April 5, 1866.

This act substantially appears in the Revised Statutes as follows:

"SEC. 5391. If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

The act of July 7, 1898, upon the same subject, reads as follows:

"SEC. 2. That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or

district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

This section, by act of Congress, approved March 4, 1909, codifying, amending, and revising the penal laws of the United States, to become effective January 1, 1910, appears as follows:

"*An Act of Congress of March 4th, 1909.*

"Public No. 350.

"SEC. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."

The only cases offering any information as to these statutes are U. S. *v.* Paul, 6 Peters, 141 (1829), which simply decided that the act of 1825 was to be limited to the laws of the several States in force at the time of its passage—this was the only question involved. And

U. S. *v.* Barney, 24 Fed. Cases, 1011 (1830).

U. S. *v.* Barnaby, 51 F. R., 23,

which simply followed the above decision (1882).

There have been only a few other cases involving any of these questions, and none involving the construction of these statutes. It is an impressive fact that the reports show only two cases brought under any of these statutes since 1829.

It seems apparent (and if anything to the contrary was the legislative intention it is not deducible, as it must be, from the language used) that the act of 1825 does not define the "offenses" but simply provides a punishment for those offenses defined by Congress, but for which Congress may have failed to prescribe specific punishment.

It would also seem that the act of 1866 attempted to extend this meaning by inserting the clause, "which offense is not prohibited by any law of Congress."

Section 5391 embodies the same clause. The act of July 7, 1898, omits this clause and reverts substantially to the terms of the original act.

These statutes have been drawn, to say the least, unsatisfactorily; even ineffectively, it is believed, if the object was to adopt the penal codes of the several States applicable under the circumstances.

One evidence of this is the language of the new act (March 4, 1909), which makes the statute clear and unexceptionable.

The word "offense" as used in the several statutes must be construed as having the well-known meaning of the word at common law.

Words in a statute which have acquired a particular legal meaning are, when applied to the subject-matter as to which they have acquired such meaning, to be taken in their legal meaning.

> The Abbotsford, 98 U. S., 440.
> Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.), 58
> U. S. *v.* Jones, 3 Wash. (U. S.), 209, and many others.

An act incorporating the Ohio & Pennsylvania Railroad Co. authorized that road to appropriate as much land as should be deemed necessary for its road, etc. It was con-

tended in Brocket *v.* Ohio, etc., R. Co., 14 Pa. St., 241; 53 Am. Dec., 534, that the act did not authorize the removal of a dwelling-house; but it was held that the word "lands" was plainly used in its technical sense; *i. e.*, that it included not only the face of the earth, but everything under or over it.

In Western Union Tel. Co. *v.* Scircle, 103 Ind., 229, it is said:

> "Where the statute employs common-law terms having a known meaning, it is presumed, unless the contrary affirmatively appears, that the terms were used in their common-law meaning."

In Buckner *v.* Real Estate Bank, 4 Ark., 441, it was said:

> "If a statute makes use of a word, the meaning of which is well known and has a definite sense at the common law, the word shall be expounded and restricted to that sense."

In Hillhouse *v.* Chester, 3 Day (Conn.), 211; 3 Am. Dec., 265, it was said:

> "It is a sound rule that whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."

See also U. S. *v.* Smith, 4 Day (Conn.), 121.

An offense is defined, at the common law, to be an act or omission forbidden by law and punishable upon ——.

Offense (Am. & Eng. Enc. of Law) is a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law; a crime; also, sometimes, a crime of the lesser grade; a misdemeanor.

> "The doing that which a penal code forbids to be done, or omitting to do what it commands. In this

> sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty."
>
> Bouv. L. Dict.

See also People *v.* Hanrahan, 75 Mich., 611; People *v.* Police Commissioners, 39 Hun. (N. Y.), 508; Wragg *v.* Penn Township, 95 Ill., 18; Moore *v.* Illinois, 14 How. (U. S.), 19; State *v.* Oleson, 26 Minn., 516; Reg. *v.* Sutcliffe, 13 A. & E., 833.

The terms "crime," "offense," and "criminal offense" are all synonymous and ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights for which a penalty is imposed or punishment inflicted in any judicial proceeding. As said in State *v.* Cantieny, 34 Minn., 1, the term includes any punishable violation of law, the doing that which a penal law forbids, or omitting to do what it commands, and hence includes all violations of municipal ordinances punishable by fine or imprisonment. A municipal ordinance is as much a law for the protection of the public as is a criminal statute of the State, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole State, and in both cases alike the punishment is imposed for the violation of a public law.

State *v.* West, 42 Minn., 147.

Bouvier Dictionary, *verbum:* "Offense.—The doing what a penal law forbids to be done, or omitting to do what it commands." So Wharton's Criminal Law, section 14.

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